

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

Yesmin v Minister for Immigration, Citizenship and Multicultural Affairs
[2022] FedCFamC2G 483

File number(s): SYG 1982 of 2018

Judgment of: **JUDGE HUMPHREYS**

Date of judgment: 21 June 2022

Catchwords: **MIGRATION** – Administrative Appeals Tribunal – Spouse visa – whether the Tribunal failed to address submissions – validity of s 375A certificate – failure to comply with s 359A – interpretation of ‘to the exclusion of all others’ in s 5F – whether there was jurisdictional error – jurisdictional error made out.

Legislation: *Migration Act 1958* (Cth) ss 5F, 104, 108, 109, 359A, 375A
Migration Regulations 1994 (Cth) regs 1.09A, 1.15A

Cases cited: *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34
Cao v Minister for Immigration & Anor [2007] FMCA 225
Carrascalao v Minister for Immigration and Border Protection [2017] FCAFC 107
CHZ19 v Minister for Home Affairs [2019] FCA 914
Dien Loan Tran v Minister for Immigration and Multicultural Affairs [1998] FCA 290
He v Minister for Immigration and Border Protection [2017] FCAFC 206
Minister for Home Affairs v Omar [2019] FCAFC 188
Minister for Immigration & Border protection v Singh (2016) 244 FCR 305
Minister for Immigration and Border Protection v Angkawijaya [2016] FCAFC 5
Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611

Division: Division 2 General Federal Law

Number of paragraphs: 79

Date of last submission/s: 8 June 2022

Date of hearing: 8 June 2022

Place: Parramatta

Solicitor for the Applicant: Mr Jones

Counsel for the Respondents: Mr Johnson

ORDERS

SYG 1982 of 2018

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: MST SALEHA YESMIN
Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE HUMPHREYS

DATE OF ORDER: 21 JUNE 2022

THE COURT ORDERS THAT:

1. A writ of certiorari removing into this Court to be quashed the purported decision of the Second Respondent made on 26 June 2018.
2. A declaration that the decision is void and of no effect.
3. An order by way of mandamus that the Second Respondent reconsider the application for review in accordance with law.
4. The First Respondent pay the Applicant's costs fixed in the sum of \$7,853.00.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE HUMPHREYS

INTRODUCTION

- 1 This matter has a somewhat complex factual history. The applicant is a female citizen of Bangladesh.
- 2 On 26 June 2012, the applicant made an application while residing offshore for a Partner visa, nominating a Mr Uddin as her sponsor. According to the visa application form, the applicant married Mr Uddin on 12 May 2012. On 17 December 2012, the applicant was granted a provisional Partner visa. The Applicant arrived in Australia on 31 December 2012.
- 3 Mr Uddin was outside Australia between 7 May 2014 and 4 November 2014. On 1 September 2014, the applicant was granted a permanent Partner visa on the basis of her relationship with Mr Uddin. On 12 November 2015, the Mr Uddin provided to the Department for Home Affairs (“the Department”) with a copy of a divorce document issued by Bangladesh authorities on 10 September 2014. The basis for the divorce was stated as “Due to reason of not agree of having co-habitation with me as wife”. The document stated Mr Uddin had divorced the applicant under the Sharia process of 1/2/3 Bain Talaq. The Court understands this to be a statement that Mr Uddin stated he divorced the applicant 3 times orally.
- 4 The applicant subsequently remarried her new partner, Mr Ahmed on 5 February 2015. This followed her divorce to Mr Uddin becoming final on 4 January 2015, 3 months after the 1/2/3 Bain Talaq process.
- 5 On 23 December 2015, a delegate of the Minister (“the delegate”) sent to the applicant a Notice of Intention to Consider Cancel (NOICC) her visa. In the NOICC, the delegate put to the applicant information that she had provided in, and in support of, her partner visa application was incorrect having regard to information the Department had obtained. In particular, the NOICC referred to information the Department had obtained from Mr Ahmed. This information suggested that the applicant was in a relationship with Mr Ahmed prior to the grant of the Permanent Residency visa that was based on her relationship to Mr Uddin. The applicant was invited the comment.
- 6 On 5 May 2016, the applicant, through her migration agent, responded to the NOICC. The submission suggested the Department was seeking to rely on uncorroborated and erroneous

statements made by Mr Ahmed during a Departmental interview, and that the applicant had been in a genuine relationship with Mr Uddin at the time she was granted a Permanent Residency visa.

- 7 On 20 May 2016, a delegate decided to cancel the applicant’s visa. On 26 May 2016, the applicant applied to the Administrative Appeals Tribunal (“the Tribunal”) for a review of the delegate’s decision. On 8 December 2016, the Tribunal (differently constituted) affirmed the delegate’s decision.
- 8 On 6 June 2017, this Court, differently constituted, by consent, ordered that the Tribunal’s decision be set aside and remitted the matter for reconsideration. The basis for that order was that Tribunal had denied the applicant procedural fairness in relation to the issue of a certificate issued under s 375A of the *Migration Act 1958* (Cth) (“the Act”), noting that the certificate had not been sufficiently disclosed to the applicant in the course of the review by the Tribunal.
- 9 On 31 October 2017, the Tribunal invited the applicant to attend a hearing on 13 December 2017. The applicant confirmed their attendance with their solicitor. The solicitor also provided a written submission to the Tribunal.
- 10 On 23 March 2018, the Tribunal invited the applicant comment on or respond to information, including in relation to information Mr Ahmed had provided in his Departmental interviews that was potentially adverse to the applicant’s case.
- 11 On 26 March 2018, the Tribunal wrote to the applicant advising her of the certificate, and attaching a copy. In the letter, the Tribunal stated that it:
- ... considers that the certificate was validly made. The You [sic] are invited to comment on the validity of the certificate.
- 12 On 6 April 2018, the applicant’s solicitor wrote to the Tribunal about the applicant’s response to the certificate, stating that in the applicant’s submission, the certificate was invalid.
- 13 On 26 June 2018, the Tribunal affirmed the decision under review. This decision was on the basis that the Tribunal found the applicant had failed to provide new information to correct previous information provided in relation to her visa application. The Tribunal decided to exercise its discretion under s 109 of the *Act* to cancel the applicant’s visa.

THE TRIBUNAL DECISION

- 14 The Tribunal decision record runs to some 33 pages and 263 paragraphs. It contains a summary of the evidence before the Tribunal, together with materials and evidence given at and subsequent to the hearing. The Tribunal decision is both comprehensive and detailed in its consideration of the issues the Tribunal was required to determine.
- 15 Given the limited scope of the grounds of judicial review, the Court does not propose to summarise the entire Tribunal decision. Any relevant matters will be dealt with in the consideration section of this judgement.

GROUND OF JUDICIAL REVIEW

- 16 The applicant relies now on three grounds of judicial review contained in an Initiating Application filed with the Court on 16 July 2018. The grounds are as follows:

1. The Tribunal failed to address submissions made by the Applicant in relation to the validity of a certificate under s 375A.

Particulars

On 26 March 2018 the Tribunal provided the Applicant with a copy of a purported certificate under s 375A of the Act. On 6 April 2018 the Applicant made submissions to the effect that the certificate was clearly invalid, and that whether it was valid or not the Tribunal should have provided a summary of the allegations contained in it. The Tribunal gave no consideration at all to the applicant's submissions in its reasons for decision.

2. Not pressed.
3. The Tribunal failed to comply with s 359A of the Act.

Particulars

The Tribunal did not give the Applicant clear particulars of the contents of the information in a form that did not breach s 375A.

4. The Tribunal misunderstood the term "to the exclusion of all others" in the definition of a married relationship in s 5F of the Act.

Particulars

The Tribunal found that there was a "relationship" between the Applicant and her current partner before her permanent visa was granted, but failed to consider whether there was a marital-type relationship as intended by the term "to the exclusion of all others".

THE APPLICANT'S SUBMISSIONS

- 17 In relation to ground one, it was submitted on 25 March 2018 the Tribunal sent an email to the applicant's representative attaching a letter and a copy of a purported certificate under s

375A of the *Act* (see; CB 206). On 6 April 2018, the applicant made submissions to the effect of that the certificate was clearly invalid. Whether it was valid or not, the Tribunal should have provided a summary of the allegations contained in it (see; CB 216-217). It was submitted that the Tribunal gave no consideration to the applicant's submissions in its reasons for decision and it did not give the applicant a summary of the allegations contained in the purported certificate. Further, the purported certificate was not mentioned in the Tribunal's decision. The Tribunal's failure to mention those submissions give rise to an inference that it did not consider them: (see; *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 at [46]; *Minister for Home Affairs v Omar* [2019] FCAFC 188 at [41]-[43]).

18 In relation to ground three, it was submitted the purported s 359A certificate was invalid in that:

- a) It did not properly identify the matter or information that it claim was subject to the section.
- b) There was no apparent reason why it would not be in the public interest to disclose "internal investigative information/advice".
- c) S 375A(2)(b) applies only to the Tribunal if the relevant notification has been given to the Tribunal by the Secretary. The person signing the document was not the Secretary of the (then) Department of Immigration and Border Protection and claimed to be a delegate of the Minister, not the Secretary.

19 Based on the concessions contained in the previous Court's consent orders, remitting the matter back to the Tribunal for further consideration, this Court should infer that the Tribunal considered the information contained in the documents that were the subject of the s 359A certificate which contained information that would be part of the reason for affirming the decision under review. Thus, the Tribunal failed to comply with the mandatory requirements of s 359A of the *Act*.

20 In relation to ground four, it was submitted that the applicant's visa was cancelled under s 109 of the *Act*, for the reason that the delegate decided under s 108 of the *Act* that she had not complied with s 104 of the *Act*.

21 Section 104 of the *Act* requires notification if circumstances change, such that an answer to a question on a non-citizen's application form is incorrect. In those new circumstances, that person must as soon as practicable inform an Officer in writing of the new circumstances and correct the answer previously given.

- 22 The change in circumstances the delegate found whether the applicant had ceased to be in a “genuine, exclusive spousal relationship” before the grant of the visa and had not informed an officer of the Department of the change (see; CB 144).
- 23 It was submitted the only changes of circumstances that can engage the obligation to inform under s 104(1) of the *Act* are changes which would result in a correct answer on the application form, or in a previous notification becoming incorrect.
- 24 It is not suggested that at the time of the application of the subclass 100 visa (which was on 26 June 2012, not 30 April 2014 as stated by the Tribunal at paragraph 21 of its decision) any incorrect answers were given by the applicant when she claimed to be in a genuine marital relationship with her sponsor.
- 25 It was submitted that the term “marital relationship” for the purposes of s 5F(2) of the *Act* and reg 1.15A of the *Migration Regulations 1994* (Cth) (“the *Regulations*”) required a consideration of the financial aspects of the relationship, the nature of the household, social aspects of the relationship and the nature of the persons’ commitments to each other. Each of the above criteria, contain further sub criteria.
- 26 In *He v Minister for Immigration and Border Protection* [2017] FCAFC 206 at [52] the Court referred to a number of authorities to the effect that a decision-maker is bound to consider each of the listed considerations by means of an active intellectual process, giving proper genuine and realistic consideration to each, and make findings in each of the prescribed matters by addressing them, not merely thinking about them.
- 27 The Tribunal determined that the relevant change that came under s 104(1) of the *Act* was that, at some time before the grant of the subclass 100 visa on 1 September 2014, the applicant’s relationship with Mr Uddin became no longer one that involved a mutual commitment to a shared life as husband and wife to the exclusion of all others, because she had started a “relationship” with Mr Ahmed, her current partner, sometime in February or March 2014. However, it was submitted that the Tribunal failed to make an assessment of the nature of that relationship in terms of the legislation.
- 28 To undermine the married relationship, any other relationship would have to be one that was incompatible with the requirements of exclusivity in the shared life referred to in s 5F(2)(b) of the *Act*. It would, itself, have to have the features of shared life as a married or de facto couple (except, of course, for exclusivity).

- 29 Even an extramarital sexual relationship would not necessarily have the effect of rendering a marital relationship “non-exclusive”. In any event, the Tribunal gave no consideration as to whether there was any sort of sexual relationship between the applicant and her current husband at that time.
- 30 It was submitted that the Tribunal gave no consideration of the crucial issue of whether any “relationship” between the applicant and Mr Ahmed, as at 1 September 2014, was a marriage-like relationship that would have been incompatible with her still being in a marital relationship with her then husband.
- 31 The Tribunal relied on evidence Mr Ahmed had, at times, resided at, or used, the same address (although Mr Uddin also resided at that address) and on an internal Department document described as “Community Status Resolution Part One – Client Case Plan”. Although dated 19 September 2014, it contains references to June 2015 and December 2015.
- 32 This document was clearly a third-party summary of interviews with the Mr Ahmed, who at the time was holding a Bridging Class E visa requiring continuing monitoring of his circumstances in Australia.
- 33 At an interview on 19 September 2014, Mr Ahmed is said by the report to be “in a relationship” with the applicant who is referred to as his “girlfriend”. The relationship is said to have developed in the previous 3 to 4 months before the interview.
- 34 At the next interview, which apparently took place on 20 November 2014, the Mr Ahmed is reported as having said that his “relationship” with the applicant had at that time (nearly 3 months after the crucial date of 1 September 2014) progressed to a point where their parents were soon to meet to “discuss marriage”. It was also made clear the applicant and Mr Ahmed were not living together. At a further interview on 12 January 2015, it was reported that there had been no change in circumstances since the previous interview. The couple were still not living together. The couple were married on 5 February 2015.
- 35 Although the Tribunal referred to the definition of a spouse in s 5F of the *Act*, it had no evidence before it of the nature of the “relationship” between the applicant and Mr Ahmed which would meet that definition, including whether it had any of the features of a marital or de facto relationship as set out in regs 1.09A and 1.15A of the *Regulations*, or even whether it was a sexual relationship. On the contrary, the Tribunal did not dispute the evidence that the couple did not consider that they should live together until after they were married in

February the following year. Significantly, the requirement that the couple lived together, or not live separately and apart on a permanent basis, is an essential criterion for both the marital and de facto relationship: (see; ss 5F(2)(d) and s5CB(2)(c) of the *Act* respectively).

36 It was also submitted that it should be noted that the Tribunal’s reference to “strong evidence” that the applicant and Mr Ahmed had known each other in Bangladesh is disputed.

37 The Tribunal’s finding, based on an undefined notion of a “relationship” between the applicant and Mr Ahmed involve the same error that was identified in *Dien Loan Tran v Minister for Immigration and Multicultural Affairs* [1998] FCA 290.

38 By failing to appreciate that s 104 of the *Act* would be engaged, only if any relationship between the applicant and a current partner before the visa was granted was of the type that was incompatible with the existence of an exclusive marital relationship between her and the sponsor, the Tribunal failed to assess the nature, at the relevant time, of the relationship between her and the current partner in terms of the legislation.

39 It did not ask itself the right questions and therefore could not lawfully have reached the required state of satisfaction that the applicant are not complied with s104.

THE FIRST RESPONDENT’S SUBMISSIONS

40 The first respondent submitted in relation to ground one, that the applicant would not only need to establish as a matter of fact that the Tribunal overlooked, or failed properly to consider the submission, but also that the consequences of that failure led it to make a decision without or beyond jurisdiction.

41 The submission went to the question of the validity of the certificate and the Tribunal’s obligations of disclosure in relation to the information the subject of the certificate. Whether or not the Tribunal took the submission into account or not, the real question is ultimately did the Tribunal deny the applicant procedural fairness. A failure to disclose the existence of a s 375A certificate may amount to a denial of procedural fairness because the existence of the certificate has an immediate and adverse impact on the applicant’s entitlement to participate in the hearing.

42 As explained in *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305, procedural fairness requires the Tribunal to disclose the existence of the certificate to the applicant but not to disclose the contents of the information the subject of the certificate. It

was submitted that the Tribunal complied with that obligation and invited the applicant to comment on the validity of the certificate, which the applicant did.

43 The Court’s attention was drawn to *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34 at [38] where the said:

... it is the plaintiff in an application for judicial review of administrative action who has the onus of establishing on the balance of probabilities the fact on which a claim to relief is founded. To the extent that the factual basis for a claim to relief is sought to be founded on an inference to be drawn from a decision-maker’s statement of reasons, the appropriateness of drawing the inference falls to be evaluated having regard to two settled principles. One is that such a statement of reasons must be read fairly and not in an unduly critical manner. The other is that it must be read in the light of the content of the statutory obligation pursuant to which it was prepared.

44 It was submitted that the Tribunal was not required to determine whether the certificate was valid and to give reasons for that determination. In that context, the absence of a reference in the reasons to the submission does not compel an inference of non-consideration, but rather that the submission was not evidence upon which basis the Tribunal made any material findings of fact.

45 It was further submitted that even if there was a breach, which was not admitted, that the breach would only constitute jurisdictional error if the breach was material. A breach is material if it denies the applicant an opportunity to give evidence or make arguments to the Tribunal and thereby deprives the applicant of the possibility of a successful outcome: (see; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [2]). In this case, the applicant was made aware of both the certificate, and the information within it. Further, that information appeared in the NOICC, the delegate’s decision record and the Tribunal’s invitation to comment.

46 The third ground contends that the Tribunal failed to comply with s 359A of the *Act* in that it failed to invite the applicant to comment on or respond to (unspecified) information that was the subject of the certificate.

47 It was submitted that the justification for the issue of the certificate was that disclosure would be contrary to the public interest as “folios 8-9 contains internal investigative information/advice”. It is well-settled that disclosure of investigative methods is a proper basis to claim public interest immunity: (see; *CHZ19 v Minister for Home Affairs* [2019] FCA 914 at [49]).

- 48 In relation to the claim that the certificate was invalid because it was not given by the Secretary was incorrect. Although a delegate created the certificate, the certificate was provided to the Tribunal by (or on behalf of) the Secretary.
- 49 What happened in this case was the Tribunal disclosed the “gist” of the information contained within the certificate to the applicant and invited for comment. It did so without compromising the secrecy requirements of s 375A of the *Act*. In the light of the disclosure of the adverse information in the NOICC, in the delegate’s decision, the applicant has not explained how any error under s 359A(1) of the *Act* could have resulted in a material jurisdictional error or any practical injustice.
- 50 The fourth ground contends the Tribunal misunderstood the term “to the exclusion of all others” in the definition of a “married relationship” in s 5F of the *Act*. The applicant contends the Tribunal needed to determine that the applicant’s relationship with Mr Ahmed, at the time prior to the decision to grant the applicant a permanent Partner visa on the basis she had informed the Department that she was in a genuine and continuing relationship with Mr Uddin. The contention that she needed to be in either a “married relationship” or a “de facto relationship” as defined by the act should not be accepted.
- 51 Whether the applicant had a mutual commitment to a shared life to the exclusion of all others with Mr Uddin at the relevant time necessarily required the Tribunal to make an evaluative judgement having regard to the legislative criteria: (see; *Minister for Immigration and Border Protection v Angkawijaya* [2016] FCAFC 5 at [42]). The Minister conceded that to the married relationship, any other relationship would have to be incompatible with the requirement of exclusivity in the shared life referred to in s 5F(2)(b) of the *Act*. However, it does not follow that this required the Tribunal to be satisfied that the other relationship was one that necessarily had the “features of a shared life as a married or de facto couple”.
- 52 It was put to the Court that it may be accepted that some extra marital relationships will not, in the particular circumstances, render a person’s marriage as one not meeting the s 5F requirements. However, it was for the Tribunal to determine that question. The Tribunal does not have to find that the other relationship is of a particular nature. All that is necessary is that it renders the married relationship one that is not based on a “mutual commitment to a shared life to the exclusion of all others”.

- 53 The Tribunal relied heavily on the “spontaneous” statements by Mr Ahmed, to the departmental officer, in particular that on 19 September 2014 where he described the applicant and his girlfriend and stated they had been a relationship that had developed in the last 3 to 4 months, and prior to that they were friends.
- 54 Mr Ahmed repeated information that his friendship had turned into a relationship in February or March 2014 in his interview with the departmental officer on 20 November 2014. The Tribunal had conflicting information before it about the nature and timing of the applicant’s relationship with Mr Ahmed. It considered those conflicts and resolved them in favour of preferring Ahmed’s statements during interview.
- 55 It was open to the Tribunal, on all the evidence before it, including the evidence of how the applicant’s relationship with the sponsor developed further after the divorce, that the earlier relationship with Mr Ahmed had commenced several months before the applicant’s partner’s visa was granted. It was open to the Tribunal to find that the relationship was one that was incompatible with the applicant having a genuine relationship with Mr Uddin that was to the exclusion of all others. There was no requirement for the Tribunal to be satisfied that the applicant’s relationship with Mr Ahmed would have met the requirements of s 5CB of the *Act*.
- 56 To the extent that the applicant relies upon the decision of *Cao v Minister for Immigration & Anor* [2007] FMCA 225 as supporting their argument, it does not. In that case, Riley FM properly recognise that whether an “extramarital” relationship renders a person’s marriage one that no longer meets the requirements of s 5F(2)(b) of the *Act* depends on the circumstances. That case, however, described the “other” relationship as a “marriage-like relationship”. The Tribunal asked itself the right question, that being whether or not the applicant’s relationship with Mr Uddin at the relevant time reflected a “mutual commitment to a shared life as a husband and wife to the exclusion of all others”.

CONSIDERATION

- 57 Grounds one and three can be conveniently dealt with together. Ground one alleges that the Tribunal failed to give consideration to the applicant’s submissions in relation to the validity of the s 359A certificate and did not give the applicant a summary of the allegations contained within the certificate. Ground three asserts the Certificate was invalid.

- 58 During the course of oral submissions, Counsel for the applicant conceded that the Invitation to Comment letter sent to the applicant on 23 March 2018 (see; CB 200), contained, with one exception, the complete ‘gist’ of the information contained within folios 8-9 of the internal investigative information that was the subject of the s 359A certificate. This material was provided to the Court as an Annexure to an Affidavit of Jonathan Tay, Graduate at Law, of 9 July 2019. The annexed material had certain redactions that were agreed by the parties not to be relevant to the grounds of judicial review
- 59 Counsel for the applicant submitted that material that was not provided was that the source of the material came from the Ministerial Intervention Unit within the Department. Counsel for the first respondent submitted that this area was the source of the information would have been well known to the applicant’s now husband Mr Ahmed. In a Statutory Declaration of 27 March 2018 (see; CB 214), Mr Ahmed makes reference to attending an interview with the Department on 19 September 2019 about his Bridging visa.
- 60 The Court is satisfied in the circumstances outlined above, that the applicant was not denied any procedural fairness in connection with the disclosure the certificate. Thus, whether the Tribunal did or did not take the submission into account cannot result in a finding a jurisdictional error.
- 61 The Court agrees with the submission of the first respondent that a failure to disclose a certificate under s 375A of the *Act* may amount to a denial of procedural fairness where it has an immediate and in adverse impact on the applicant’s entitlement to participate in the hearing; (see; *Minister for Immigration & Border protection v Singh* (2016) 244 FCR 305). As explained in that case, procedural fairness requires the Tribunal to disclose the existence of the certificate but not to disclose the contents of it.
- 62 In this case, the Tribunal disclosed not only the existence of the certificate but also provided the full gist of the information to the applicant in the invitation to comment. Further, the applicant was invited to comment on the validity of the certificate and did so. The fact that the Tribunal did not make reference to the applicant’s submissions regarding the validity of the certificate does not of itself indicate that those submissions were not taken account of.
- 63 The Court is satisfied in the circumstances of this case that no real injustice was perpetrated upon the applicant in the procedure that the Tribunal adopted. The requirements to notify the applicant of the existence of the certificate and invite comment on its validity were followed.

Further, the “gist” of the information was provided to the applicant and she was invited to comment on that information and did so. Ground one has no merit.

- 64 Ground three asserts the Tribunal failed to comply with s 359A of the *Act*, in that it failed to invite the applicant to comment or respond to (unspecified) information the subject of certificate. The Court is satisfied that the certificate was validly issued. There can be no doubt that disclosure investigative methods is a proper basis to claim public interest immunity: (see; *CHZ19 v Minister for Home Affairs* [2019] FCA 914 at [49]).
- 65 Further, as indicated above, the only information that the applicant was not provided an opportunity to comment on was the source of the information. That information, however, was well known to the applicant. The Court does not accept the submission that the certificate was given by a delegate rather than the Secretary as required by s 375A(2)(b) of the *Act*. The Court is satisfied that although the certificate was created by a delegate, the material was provided to the Tribunal by (or on behalf of) the Secretary.
- 66 Even if the Court is wrong with its conclusions as to grounds one or three, no practical injustice arises from the alleged failures, as the gist of the material was given to the applicant with an invitation to comment. The applicant did so. The source of the information was readily apparent to the applicant and indeed commented upon by Mr Ahmed in his Statutory Declaration. The error, if there be one, was certainly not material to the outcome. Ground three has no merit.
- 67 Ground four revolves around the contention that the Tribunal failed to ask itself the correct question in relation to the “relationship” between the applicant and Mr Ahmed prior to the granting of the Spouse visa by the Department on 1 September 2014, and whether there was a requirement on the applicant to correct the previous information that she had provided to the Department.
- 68 Both parties agree that what occurred after 1 September 2014 is irrelevant, in that there was no obligation on the applicant disclose information after that date. What had occurred after 1 September 2014, is only relevant where it might be used to determine what the situation was in relation to the nature of “relationship” between the applicant and Mr Ahmed prior to that date, and whether or not the nature of the relationship required the applicant to disclose its existence.

- 69 As set out above, Mr Uddin departed Australia in May 2014. It was only after the applicant was granted her permanent residency visa that Mr Uddin undertook a Sharia law divorce against the applicant. That divorce became final in January 2015. The applicant then married Mr Ahmed in February 2015. The timeline might be viewed by some as convenient.
- 70 In considering the timeline however, and the varying versions of events, the Court must be careful not to venture into the realm of impermissible merits review. It was for the Tribunal to determine the relevant facts. The Court should only interfere where there is a jurisdictional error. Such an error will not exist where reasonable minds might differ as to the relevant conclusions to be drawn from that evidence. A decision cannot be said by reviewing Court to be illogical or irrational or unreasonable simply because the conclusion that has been preferred to another possible conclusion: (see; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [131]).
- 71 Having said that however, it was necessary for the Tribunal to ask itself the correct question. That question revolved around whether or not the “relationship” which existed between Mr Ahmed and the applicant, prior to 1 September 2014, necessarily involved that relationship being incompatible with the notion of a married relationship as defined in the *Act*.
- 72 The Court rejects the assertion by the applicant that in order to find the applicant’s relationship with Mr Ahmed was incompatible with that with Mr Uddin, the criteria contained within the *Act* and *Regulations* as to what constitutes a marital relationship needed to be established, for example shared financial resources.
- 73 Whilst Mr Ahmed may have had certain views as to the status of the relationship between himself and the applicant, at varying points of time, that does not necessarily indicate what may have been in the mind of the applicant. For example, one party may have a completely different idea of what status a relationship has to the other party at any point in time. That is the nature of human relationships.
- 74 The Tribunal, in this case, failed to concentrate its consideration as to what was in the mind of the applicant at the relevant point of time, being 1 September 2014. The Tribunal was required to determine whether or not the applicant’s relationship with Mr Ahmed was incompatible with her married relationship with Mr Uddin. The Tribunal instead concentrated on the answers given by Mr Ahmed, in his departmental interviews, as being conclusive of the nature of the relationship between him and the applicant.

- 75 As pointed out by Counsel for the applicant, nowhere in the Tribunal hearing transcript does there appear to be any detailed questioning of the applicant as to what was in her mind as to the nature of her relationship with Mr Ahmed, as compared to Mr Uddin, at relevant stages prior to 1 September 2014. The applicant stated that she was shocked by the notification of the divorce by Mr Uddin when she received notification about it in mid-September 2014.
- 76 Whilst the Tribunal found that the ‘relationship’ commenced with Mr Ahmed in February or March 2014, the Court is not satisfied that the Tribunal correctly determined that that relationship was incompatible with the relationship with Mr Uddin prior to 1 September 2014. The Tribunal merely found there was a relationship, but did not discuss at any point the nature and status of that relationship.
- 77 The Tribunal appeared to accept that the applicant and Mr Ahmed did not have a sexual relationship prior to being married. There was apparent differences in accounts as to relevant addresses where the applicant and Mr Ahmed were living at any one time until they moved to an address in Lakemba post-marriage. The Tribunal found that it was possible that they were either living together or meeting in secret prior to 1 September 2014: (see; paragraph 150 of the Tribunal’s decision). The Tribunal also found that despite Mr Ahmed stating he was not living with the applicant as they were not married, the Tribunal found this did not exclude them from having relationship elsewhere. These were suspicions on the part of the Tribunal, but it did not provide a relevant evidential basis to find the applicant and Mr Ahmed were in a relationship such that it required disclosure to the Department.
- 78 The conclusion at paragraph 169 of the Tribunal’s decision that the applicant and Mr Uddin were not in a married relationship that was to exclusion of all others is almost entirely based on the evidence of Mr Ahmed in his interviews with departmental officers. It fails to take account of the necessary state of mind of the applicant as to whether at the relevant time, she was of the view that her relationship with Mr Ahmed was incompatible with her relationship with Mr Uddin. It was only if the applicant was subjectively of the view that the relationship with Mr Ahmed was incompatible with her relationship with Mr Uddin, or the facts or circumstances clearly indicated this was objectively the case, that the disclosure provision required by s 104 of the *Act* was triggered. The Court is not satisfied that the evidence of what was in Mr Ahmed’s mind, together with all the other material that was considered by the Tribunal, was sufficient for the finding made by the Tribunal to be safely arrived at. That is, the conclusion arrived at had an insufficient evidential basis.

CONCLUSION

79 In the unusual factual circumstances of this matter, the Court is of the view that jurisdictional error has occurred and that the orders sought by the applicant should be granted. The Court will hear the parties as to costs.

I certify that the preceding seventy-nine (79) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Humphreys.

Associate:

Dated: 21 June 2022